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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1446

HENRY LEE ROGERS, LEE CHESTER SMITH, and N. A. THOMPSON,

Petitioners,

v.

INTERNATIONAL PAPER COMPANY; INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS AFL-CIO, and its LOCAL 2033; UNITED PAPERWORKERS INTERNATIONAL UNION AFL-CIO, and its LOCALS 731, 735, 833 and 898,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR RESPONDENTS INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS AFL-CIO, AND ITS LOCAL 2033 IN OPPOSITION TO PETITION FOR CERTIORARI

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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ARGUMENT

The Decision of the Courts Below, In Denying Back Pay, Is Consistent With This Court's Decision in Albemarle Paper Company v. Moody, and Halifax Local No. 425, United Papermakers and Paperworkers, AFL-CIO v. Moody, —— U.S. ——, 43 U.S.L.W. 4880, Decided June 25, 1975.

We submit that the facts of the instant case, insofar as they bear on the equitable denial of back pay, are distinguishable from those in *Albemarle Paper Co.* v.

Moody and *Halifax Local No. 425, United Papermakers and Paperworkers, AFL-CIO* v. *Moody*, —— U.S. ——, 43 U.S.L.W. 4880, 10 FEP Cases 1181, decided June 25, 1975. We also submit that the denial of back pay in the instant case is consistent with the principles enunciated by this Court in those cases.

Whereas in *Albemarle,* petitioners relied, in part [1], on "the lack of 'evidence of bad faith non-compliance with the Act'" (43 U.S.L.W. at 4883), much more factually is involved here. As the Court of Appeals stated in the instant case (Pet., p. 57a-60a):

> "In 1968, the Office of Federal Contract Compliance, in the execution of the Executive Order program, advised I.P. [International Paper Co.] that they had failed to comply with the nondiscrimination requirements of the Executive Order and that, in order to retain government contract privileges, they would have to change employment practices. A conference with representatives of the Southern Kraft Division of I.P. was thereupon called by OFCC in Jackson, Mississippi, to discuss necessary modifications for Executive Order compliance. A Memorandum of Understanding, negotiated at that meeting and endorsed by the affected unions and representative mills, *was approved by the OFCC as sufficient for compliance with the Executive Order.* That memorandum, dealing only with production jobs, created remedial transfer, promotion and recall opportunities for members of an 'affected class,' defined as all black incumbent employees hired before September 1, 1962, and those additional blacks hired into black jobs after

[1] We put to one side petitioners' second defense in *Albemarle* that " 'the defendants would be substantially prejudiced' by an award of backpay that was demanded contrary to an earlier representation and late in the progress of the litigation." 43 U.S.L.W. at 4883.

> 1962. The memorandum provided that members of the affected class could compete against other applicants for entry level positions in any other line of progression on the basis of mill seniority, so long as an affected class member's qualifications were as high as the minimally qualified employee currently working in the line. Affected class members who transferred under these provisions were offered wage maintenance protection so as not to deter the exercise of the transfer rights to lower paying entry level jobs in other lines of progression. The memorandum also established that promotion, demotion, layoff, and recall rights of affected class members would be governed by mill seniority whenever a class member was in competition with a nonclass member. Finally the memorandum provided that negotiations were to take place at the mill level, between local management and local unions, regarding possible merger or shortening of lines of progression, job skipping, and advanced level entry.
>
> "*In May, 1969, upon I.P.'s request, OFCC issued a clarification of the Jackson Memorandum's provisions relating to promotion and recall. . . .*
>
> "*After the trial of this matter below, a revision of the Jackson Memorandum was tentatively adopted.* The 1972 Jackson Memorandum expanded the parameters of the affected class; advanced the maximum red circle wage maintenance rates from $3.00 to $3.86 per hour; permitted permanent promotion eligibility to rest upon fulfillment of residency requirements in prerequisite jobs without regard to the permanent or temporary nature of assignment thereto; and permitted affected class competition on the basis of mill seniority against incumbents with recall rights for entry level positions in lines of progression. The memorandum again called for local negotiations on advanced level entry and job skipping." (Footnotes omitted; emphasis added.)

It was against this background, set out at length in the opinions of both lower courts [2] in the instant case, and argued below by the Company, the IBEW and its Local 2033 as a basis for denying backpay,[3] that the Court of Appeals addressed itself to the back pay issue.[4] And while the Court of Appeals ruled that

[2] For the district court's discussion of these facts, see Pet. pp. 11a-14a, 17a-18a. "The OFCC adopted the position that the Jackson Memorandum was sufficient for compliance with Executive Order 11246 [footnote omitted] without the need for further collective bargaining beyond the agreed changes included in the Memorandum." (Pet. pp. 12a-13a).

[3] Thus, the Company's brief in the Court of Appeals stated:

> "Moreover, IP submits that its actions in reliance on *'authoritative administrative determinations', specifically addressed to its obligations under the law* [footnote omitted] make monetary liability against it inappropriate, even if those administrative determinations were now to be regarded as inadequate or erroneous." (Emphasis in the original.) Brief for International Paper Co., pp. 45-46.

And the brief for Local 2033 (pp. 6-7) stated:

> "Also we believe it a fair observation, or conclusion, to note that beginning in 1962 with the Executive Order of President Kennedy, the parties to this litigation clearly began to look to the federal government for guidance in this area of concern. This, perhaps, is always the result when the government enters the field. In any event, the record here is abundantly clear that beginning in 1962, and continuing through the trial of this case, all of these parties have relied upon the guidance of the federal government in this area of concern, and all of them have done whatever the federal government directed, from time to time, to try and comply with what was thought by all parties to be reasonable standards of resolution. As time passed, these standards were constantly revised and up-graded, and perhaps this will continue to be the policy of the federal government and those parties (including plaintiffs) who lean on it for guidance and solutions."

[4] Petitioners' characterization (Pet., p. 10) of the Court of Appeals' holding on back pay is therefore, made out of context and misplaced. Rather, the correct interpretation of the holding is that which takes into consideration the preceding passage of the opinion, quoted from above.

"those compliance pronouncements ["in the Jackson Memoranda"] are deficient in several respects," and, accordingly, directed the District Court to issue certain injunctive relief for the purpose of "effectuating the rightful place doctrine" (Pet., pp. 61a-62a), it declined to disturb the District Court's equitable denial of back pay.

Thus, there is presented by the instant case a situation in which respondents were acting in accordance with, indeed in reliance on, requirements imposed by the Office of Federal Contract Compliance for the enforcement of equal employment opportunity. Moreover, such requirements were not merely those expressed in administrative regulations of general applicability, but were developed and approved by OFCC thereunder for use by these particular parties to remedy the very employment practices which were involved in the instant case.[5]

While it is true, as the Court of Appeals itself observed (Pet., pp. 60a-61a n. 36), that compliance with the non-discrimination standards of the Executive Order program does not excuse compliance with Title VII, we would submit that compliance with the former under the close and continuing supervision of the federal agency having jurisdiction, is the kind of

[5] The situation may be compared to one where a party is acting pursuant to, and in compliance with, an injunctive order of a federal district court under Title VII only to have another arm of the federal government, such as the EEOC, prevail in obtaining the issuance by the court of further injunctive relief. Would it be error for the district court, in its equitable discretion, to deny back pay resulting from economic losses incurred during the period when the lesser relief was operative and being relied upon by the defendant as representing adequate compliance?

reason justifying a denial of back pay which "would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injury suffered through past discrimination." 43 U.S.L.W. at 4885. And, it is the kind of reason which is both limited in its applicability to the "facts and circumstances peculiar to particular cases" and, at the same time, susceptible to "a consistent and principled application of the back pay provision." 43 U.S.L.W. at 4885.

Moreover, it is the kind of reason which this Court appears to have recognized as being permissibly within the scope of district courts' equitable discretion. Thus, in footnotes 17 and 18 of this Court's Opinion in *Albemarle* (43 U.S.L.W. at 4885-86), the Court referred to the very narrow immunity from liability *expressly* provided in Section 713(b) of the Act, and, in addition, the Court recognized the distinction between the "good faith" defense which it rejected in *Albemarle* and a defense based on reliance on state "female protective" statutes which are inconsistent with Title VII. The defense involved in the instant case, we would submit, fits within the intent of Section 713(b) and presents an even stronger basis for permissible trial court discretion than the "state protective law" defense.

Like the "state protective law" defense, what is involved here is reliance on the dictates of another governmental body. Here, however, we deal not with a conflict between federal and state law where, clearly, the former supersedes the latter, but rather with parallel obligations imposed within the federal government itself. And while Section 713(b) speaks in terms of reliance on the interpretation or opinion of the Equal Employment Opportunity Commission—the agency

responsible for enforcing compliance with Title VII—the same statute (Section 715) (42 U.S.C. § 2000e-14) also recognizes the need for a unified federal administrative interpretation of Title VII. To promote this purpose, Section 715 established an Equal Employment Opportunity Coordinating Council composed, *inter alia,* of the Secretary of Labor (under whose jurisdiction OFCC operates), and the Chairman of the EEOC. Section 715 goes on to provide that

> "The Council shall have the responsibility for developing and implementing agreements, policies and practices designed to maximize effort, promote efficiency, and *eliminate conflict, competition, duplication and inconsistency* among the operations, functions and jurisdictions of the various departments, agencies and branches of the Federal government responsible for the implementation and enforcement of equal employment opportunity legislation, orders, and policies." (Emphasis added.)

Thus, it would appear to be wholly consistent with the purposes of Title VII to allow district courts, in their equitable discretion, to deny back pay attributable to practices engaged in with the specific approval of the OFCC in its implementation of the Executive Order program for the enforcement of equal employment opportunity.

CONCLUSION

For the foregoing reasons, it is clear that the Court of Appeals' decision on the back pay issue was correct under the principles enunciated by this Court in *Albemarle Paper Co.* v. *Moody* and *Halifax Local No. 425, United Papermakers and Paperworkers, AFL-CIO* v. *Moody, supra.* Its judgment denying back pay,

therefore, should not be disturbed, and the Petition for the Writ should be denied.

Alternatively, if the Court believes that the lower courts should reconsider their judgments, and the distinguishing facts of the instant case, in the light of *Albemarle,* the Court should direct the Court of Appeals to remand to the district court for reconsideration in light of *Albemarle.*

Respectfully submitted,

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